



Signed and Filed: July 22, 2020

*Dennis Montali*

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re ) Bankruptcy Case No. 19-31225 DM  
)  
ROSE COURT, LLC, ) Chapter 11  
)  
)  
Debtor. )  
)  
\_\_\_\_\_)  
)  
ROSE COURT, LLC, ) Adversary Case No. 19-03058-DM  
)  
Plaintiff, )  
)  
v. ) MEMORANDUM DECISION REGARDING  
) DEFENDANTS' MOTION TO DISMISS  
) AND DEBTOR'S MOTION TO AMEND  
U.S. BANK NA, successor trustee) THE FIRST AMENDED COMPLAINT  
to Bank of America, NA, )  
successor in interest to )  
LaSalle Bank NA, as trustee, on )  
behalf of the holders of the )  
WaMu Mortgage Pass-Through )  
Certificates, Series 2007-HY7, )  
its assignees and/or )  
successors, by and through its )  
servicing agent Select )  
Portfolio Servicing, Inc.; )  
SELECT PORTFOLIO SERVICING, )  
INC.; and QUALITY LOAN SERVICE )  
CORPORATION, )  
Defendants. )  
\_\_\_\_\_)

1 In this adversary proceeding, Rose Court LLC ("Debtor") is  
2 attempting to invalidate a foreclosure sale of certain property  
3 located in Monte Sereno, California (the "Property") that  
4 occurred on November 25, 2019. After this court dismissed the  
5 original complaint, Debtor filed a first amended complaint (the  
6 "FAC"). Defendant Quality Loan Services ("Quality") filed the  
7 underlying motion to dismiss ("MTD") the FAC. Defendants Select  
8 Portfolio Servicing, Inc. ("Select Portfolio") and U.S. Bank  
9 N.A. ("U.S. Bank") joined the MTD.<sup>1</sup>

10 Debtor opposed the MTD and moved for leave to amend the FAC  
11 (the "Motion to Amend"). Select Portfolio and Quality opposed  
12 the Motion to Amend. For the reasons set forth below, the court  
13 is granting the MTD and denying the Motion to Amend.

14 I. The FAC and MTD

15 A. Allegations Regarding Falsified Note

16 In the introductory section of the FAC, Debtor states in  
17 paragraph 7:

18 7. PLAINTIFF is informed and believes and, based  
19 thereon, alleges that Defendant U.S. BANK, through a  
20 falsified note instrument and falsified void allonge  
21 instrument, is part of a fraudulent collection scheme  
22 and is a creditor with a disputed claim allegedly  
23 secured by the PLAINTIFF'S real property located at  
24 15520 Quito Road, Monte Sereno, California 95030 (the  
25 "SUBJECT PROPERTY").

26 See FAC at dkt. 31, p. 3, lines 3-9. Apart from that  
27 introductory paragraph, Debtor does not plead any facts giving  
28 rise to that purported claim. To the contrary, the "General

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<sup>1</sup> Quality, Select Portfolio, and U.S. Bank are collectively referred to as "Defendants."

1 Allegations" in paragraphs 12-25 do not mention the purportedly  
2 falsified note, and neither does the first and only claim for  
3 relief, which focuses on the purported irregularities of the  
4 foreclosure sale.

5 B. Allegations Regarding Noncompletion of Foreclosure  
6 Sale

7 Debtor asserts in the FAC and in other pleadings that no  
8 foreclosure sale actually occurred. Paragraph 15 of the FAC  
9 states that the sale was postponed:

10 On November 25, 2019, at 10:22 a.m., the date of the  
11 supposed auction, having been no bids by the creditor  
12 nor the public, LAM announced publicly that the sale  
would be postponed, upon which, on information and  
belief, all bidders relied.

13 Debtor alleges in paragraph 16 of the FAC that on December 5,  
14 2019, "despite the sale having been publicly postponed after no  
15 bids and no credit bid, Quality fraudulently executed a  
16 Trustee's Deed Upon Sale allegedly transferring the Subject  
17 Property to Defendant U.S. BANK pursuant to the falsely alleged  
18 Foreclosure Sale." Yet the FAC itself provides a transcript of  
19 the sale that is inconsistent with the contention that the sale  
20 was postponed and did not occur:

21 Good Morning. My name is Chapman. I'm here to conduct  
22 a trustee's sale. Today, I will sell for Quality Loan  
23 Service Corporation going to sell Trustee Sale Number  
24 CA-14-655475-HL, with an APN of 410-36-007 and a  
purported address of 15520 Quito Road, Monte Sereno,  
C-A, 95030.

25 I have a clear specific bid in the amount of  
26 \$3,583,288.06. Does anybody wish to step over and  
27 qualify?

1 Trustee's sale number C-A-14-655475-HL, trustor, Teri  
2 Ha Nguyen, a married woman, under deed of trust dated  
3 April 24th, 2007, recorded on May 1st, 2007,  
4 instrument number 19406773 of official records of  
5 Santa Clara County, State of California, covering  
6 property in said county and state, described as APN  
7 410-36-007. The common destination is purported to be  
8 15520 Quito Road, Monte Sereno City, C-A, 95030. No  
9 warranty is given as to the completeness or the  
10 correctness of this address. Sale of the property is  
11 on an as is basis and without covenant or warranty,  
12 expressed or implied, regarding title, condition,  
13 possession or encumbrances.

14 I have been authorized by the trustee and beneficiary  
15 to place an opening bid in the amount of 3,583,288.06.  
16 Are there any further bids? No. No bidders, no person  
17 present.

18 So for the second time, anyone want to bid? For the  
19 third and final time, any more bid? Okay. So nobody  
20 here, so the property is sold back to the beneficiary  
21 with no bidders. So the bidding is closed.

22 See FAC, dkt. 31 at 4:28 (emphasis added). Despite this clear  
23 statement by the auctioneer at the duly noticed foreclosure  
24 sale, Debtor asserts that the sale was postponed.

25 After the sale concluded and was verbally confirmed,  
26 Debtor's managing members asked the auctioneer about the  
27 consequences of the new bankruptcy case on the sale. The  
28 transcript of the sale is clear and any other conversations  
between the managing members and the auctioneer do not overcome  
the presumption of the validity of the foreclosure sale,  
particularly when the trustee's deed was delivered. See Cal.  
Civ. Code § 2924h ("[T]he trustee's sale shall be deemed final  
upon the acceptance of the last and highest bid, and shall be  
deemed perfected as of 8 a.m. on the actual date of sale if the

1 trustee's deed is recorded within 15 calendar days after the  
2 sale, or the next business day following the 15th day if the  
3 county recorder in which the property is located is closed on  
4 the 15th day"). That presumption became conclusive upon  
5 delivery of the trustee's deed to the successful bidder.  
6 *Biancalana v. T.D. Serv. Co.*, 56 Cal. 4th 807, 814, 300 P.3d  
7 518, 522 (2013).

8 In light of the foregoing, the court will GRANT the MTD.

9 II. The Motion to Amend the FAC

10 In the Motion to Amend and the proposed second amended  
11 complaint ("SAC"), Debtor contends that the underlying note and  
12 deed of trust are unenforceable. The SAC alleges that the  
13 signature of managing member Teri H. Nguyen ("Nguyen") was  
14 forged. This is at least the fourth action since 2017 filed by  
15 Nguyen and Debtor contesting the validity and enforceability of  
16 the underlying note and the deed of trust.<sup>2</sup>

17 Federal Rule of Civil Procedure 41(a)(1)(B) ("Rule 41"),  
18 made applicable by Federal Rule of Bankruptcy Procedure 7041,  
19 provides that a voluntary dismissal is without prejudice unless  
20 the plaintiff previously dismissed any federal or state court  
21 action based on or including the same claim:

22 Unless the notice or stipulation states otherwise, the  
23 dismissal is without prejudice. But if the plaintiff  
24 previously dismissed any federal- or state-court  
25 action based on or including the same claim, a notice

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26 <sup>2</sup> The court notes that prior to 2017, Debtor and/or Nguyen filed and dismissed  
27 multiple actions contesting the validity of the note and deed of trust. See  
28 Declaration of Teri Nguyen in Support of Opposition to Motion for Relief to  
the Automatic Stay filed on December 18, 2012 in *In re Rose Court, LLC* at  
dkt. 22 (Case No. 12-58012).

1       of dismissal operates as an adjudication on the  
2       merits."

3       *Id.*

4       Since 2017, Debtor has voluntarily dismissed the  
5       following actions against Select Portfolio and Quality that  
6       - like the current action - challenged their right to  
7       foreclose:

8           (1) *Rose Court LLC v. Select Portfolio Servicing*  
9           *Inc., et al*, Case No. 17CV313755 in the Superior  
10          Court of the State of California, County of Santa  
11          Clara filed on February 21, 2018 (see Exh. 1-3 to  
12          the Request for Judicial Notice ("RJN") at dkt.  
13          57));

14          (2) *Rose Court LLC and Teri H. Nguyen v. Select*  
15          *Portfolio Servicing Inc., et al*, Case No. CGC-19-  
16          580261 in the Superior Court of the State of  
17          California, County of San Francisco filed on  
18          December 22, 2019, and removed to the U.S.  
19          District Court as Case No. 3:19-CV-07688-LB (see  
20          Exh. 4-5 to the RJN).

21          (2) *Rose Court LLC, et al. v. Select Portfolio*  
22          *Servicing, Inc. et al.*, Case No. 19-CV-359333 in  
23          the Superior Court for the State of California,  
24          County of Santa Clara, Case No. 19-CV-359333 (see  
25          Exh. 6-7 to the RJN).

26       Debtor seeks to amend the FAC to add claims that the  
27       note and deed of trust on the Property are unenforceable  
28       for reasons unrelated to the foreclosure sale. The claims  
29       that Debtor seeks to add were asserted in the three  
30       lawsuits that Debtor voluntarily dismissed. Under Rule  
31       41(a)(1), these two voluntary dismissals operate as an  
32       adjudication on the merits of the claims Debtor wants to

1 add. Consequently, because such an amendment is futile,  
2 the court will deny Debtor's Motion to Amend.

3 III. CONCLUSION

4 For the reasons stated above, the court is granting the MTD  
5 and denying the Motion to Amend. Counsel for Select Portfolio  
6 should prepare orders GRANTING the MTD and DENYING the Motion to  
7 Amend "for the reasons set forth" in this memorandum decision.<sup>3</sup>  
8 Counsel should comply with B.L.R. 9021-1(c) before uploading the  
9 order.

10 \*\*END OF MEMORANDUM DECISION\*\*

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28 <sup>3</sup> The order should not repeat the findings and conclusions of this decision.

COURT SERVICE LIST

ECF Recipients